BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

REPLY OF UNION PACIFIC TO PETITIONS FOR STAY

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

UNION PACIFIC'S REPLY TO PETITIONS OF BNSF AND CN FOR STAY PENDING JUDICIAL REVIEW

Union Pacific Corporation and Union Pacific Railroad Company (collectively, "UP") hereby reply to the Petitions for Stay Pending Judicial Review filed by Burlington Northern Santa Fe Corporation and Burlington Northern and Santa Fe Railway (collectively, "BNSF") on March 20, 2000 ("BNSF Pet.") and by Canadian National Railway Company ("CN") on March 22, 2000 ("CN Pet.").

INTRODUCTION

In its decision served on March 17, 2000 (the "Suspension Order"), the Board found that (1) the record in this proceeding establishes the need for thorough reevaluation of the substantive standards applicable to major rail consolidations; (2) any such standards would apply to all future Class I combinations, including the anticipated CN/BNSF proposal; and (3) the public interest would suffer irreparable harm if any Class I merger application were considered during the pendency of the Board's rulemaking. The Board concluded that, in view of these findings, the sensible course was to suspend for 15 months the acceptance and processing of all Class I merger applications.[1]

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[1] CN reads the Board's Suspension Order as effecting a sweeping injunction against a "wide range" of private merger-related activity unrelated to the Board's processes governing review of merger proposals. CN Pet. at 7. Based on this reading of the Order, CN asserts that the prohibition is overbroad and infringes the First Amendment rights of Class I railroads. UP understands the Suspension Order to be directed toward activity related to "merger activity" before the Board -- i.e., principally the acceptance and processing of applications for approval of Class I rail combinations, rather than private speech or activity beyond the Board's domain.

BNSF and CN argue that the Board should issue a stay while they seek judicial review of the Suspension Order. But a stay cannot be granted unless BNSF and CN satisfy their burden of proving that they are likely to succeed on the merits of their appeal, that the balance of hardships weighs in favor of a stay, and that the public interest strongly favors a stay. See, e.g., STB Ex Parte No. 627, Market Dominance Determinations – Product and Geographic Competition, Decision served Feb. 23, 2000. As we show below, the Board had ample authority and grounds for issuing its Suspension Order, so BNSF and CN are unlikely to succeed on the merits of their appeal. Although we devote most of this submission (Part I) to the merits, we comment briefly (Part II) on the balance of alleged harms and the overriding public interest considerations that support the Board's decision.

I. BECAUSE THE BOARD PROPERLY EXERCISED ITS STATUTORY POWER TO ISSUE THE SUSPENSION ORDER, BNSF AND CN ARE UNLIKELY TO PREVAIL ON APPEAL

In view of the Board's broad statutory power to issue rules and its plenary responsibility to protect the public interest in connection with rail consolidations, the Board had authority to issue the Suspension Order. The Board had no obligation to use notice and comment procedures before issuing the Order.

A. The Board Had Authority to Issue the Suspension Order

Congress delegated to the Board full authority to carry out its statutory responsibilities, including the power to engage in rulemaking. Section 721 of Title 49, entitled "Powers," provides that the Board "shall carry out this chapter and subtitle IV" (which includes provisions relating to railroad combinations) and that the Board "may prescribe regulations in carrying out this chapter and subtitle IV." 49 U.S.C. § 721(a). This section grants the Board broad power and responsibility to issue orders fulfilling all of its statutory responsibilities. As the Supreme Court explained in ICC v. American Trucking Ass'ns, Inc., 467 U.S. 354 (1984), Congress conferred expansive authority on the Board:

> The Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. 49 U.S.C. § 10321(a) [now § 721(a)]. As we have held in the past, the Commission also has discretion to take actions that are "'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power.'"

Id. at 364-65 (citations omitted); see also Central Forwarding, Inc. v. ICC, 698 F.2d 1266, 1276-77 (5th Cir. 1983) (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973)) (ICC's general rulemaking authority under predecessor of Section 721(a) extended to all matters "reasonably related to the purposes of the enabling legislation").

The Board's Suspension Order is rooted firmly and directly in the statutory framework that Congress established. Congress gave the Board exclusive and plenary responsibility to protect the public interest in connection with railroad consolidations. 49 U.S.C. § 11321(a). The statute provides that rail consolidations "may be carried out only with the approval and authorization of the Board." 49 U.S.C. § 11323(a). Congress delegated to the Board, as the expert administrative agency, the responsibility of ensuring that railroad mergers are "consistent with the public interest," 49 U.S.C. § 11324(c), and it reposed in the Board wide latitude to determine what "factors [are] relevant to the public interest." Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486, 499 (1968); see also, e.g., Gilbertville Trucking Co. v. United States, 371 U.S. 115, 127-29 (1962); McLean Trucking Co. v. United States, 321 U.S. 67, 85-86 (1944). Section 721(a) gives the Board rulemaking and procedural authority to decide how best to discharge its responsibility of allowing mergers only in conformity with the public interest.

The Board's Suspension Order was an entirely reasonable exercise of its statutory authority to harmonize rail consolidations with the public interest. The Board properly concluded that, in light of the major changes that had occurred in the rail industry, its rules governing review of mergers were outdated and that it should institute a rulemaking proceeding to develop more appropriate rules applicable to all future Class I combinations. Suspension Order at 2-3.[2] That decision left the Board with the procedural choice whether to allow Class I merger applications to be filed and processed while it

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[2] BNSF and CN do not contest the Board's authority to conduct such a rulemaking. See BNSF Pet. at 8-9; CN Pet. at 6. Indeed, they propose new standards for reviewing merger proposals.

revised its rules. The Board found that, from an administrative standpoint, it could not effectively process one or more merger applications simultaneously with the rulemaking and that processing applications might be a waste of time because the approval process might have to "start all over again" under the new rules. Id. at 7. The Board concluded that the better course was temporarily to suspend the filing and processing of new merger applications, permitting "vital public interest issues to be addressed on an evenhanded basis for all merger proposals." Id. at 9. The Board also found that permitting Class I merger applications to go forward during the rulemaking would entail "very serious risks" and would threaten irreparable harm to the public interest.[3]

Although the Suspension Order may be an "unprecedented" exercise of the Board's merger authority, Order at 10, it follows a well-established federal agency practice of suspending action on applications for agency approvals while developing new standards of general applicability or for other sound policy reasons. See, e.g., Neighborhood TV Co. v. FCC, 742 F.2d 629 (D.C. Cir. 1984) (upholding FCC's "freeze" on certain television translator applications); Westinghouse Elec. Corp. v. NRC, 598 F.2d 759 (3d Cir. 1979) (upholding NRC's moratorium on plutonium-recycling license applications); Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976) (upholding Department of Interior's "pause" on coal prospecting permits); Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963) (upholding FCC's "freeze" on certain radio broadcast license applications).

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[3] See, e.g., Order at 2-3 (acting on final round of mergers while reviewing rules would be "disruptive to the rail system and to rail service that remains well below acceptable levels"); id. at 7 (proceeding without new rules in place would require costly duplication of effort); id. at 8 ("very serious risks associated with proceeding with individual merger proposals at this time, before we have new rules in place"); id. at 9 (nothing more uncertain, and destructive of investment incentives, "than moving forward without appropriate rules in place at the beginning to govern the proceeding"); id. at 10 (going forward with "any individual merger proceeding in the meantime" would be "to the detriment of all of the public interest concerns that we are charged with advancing").

B. The Board Did Not Violate the Administrative Procedure Act

BNSF and CN argue that the Suspension Order is unlawful because the Board failed to comply with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. Those procedures did not apply to the Suspension Order.

1. The Suspension Order Is a Procedural Rule for Which Notice and Comment Procedures Were Not Required

The Suspension Order is properly viewed as a "rule of agency organization, procedure, or practice" that is exempt from notice and comment requirements. 5 U.S.C. § 553(b)(A).[4] A "rule of agency organization, procedure, or practice" is one that "does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" Chamber of Commerce v. Department of Labor, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)); see also American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (same). While the Suspension Order may delay the acceptance and consideration of a BNSF/CN merger application, it does not constitute a substantive rule that approves or disapproves specific transactions. See Chamber of Commerce, 174 F.3d at 211 (quoting American Hosp. Ass'n, 834 F.2d at 1047). The Suspension Order merely "maintain[s] the status quo," Order at 3, while the Board revises its outdated merger rules. BNSF and CN will be free to file their merger application once the rulemaking is complete.

BNSF argues that the Suspension Order constitutes a "substantive" rule for which notice and comment procedures were required because the Order "substantially" affects BNSF's "rights and interests." See BNSF Pet. at 6 n.5. But the fact that BNSF may be affected by the Order does not mean that it qualifies as a "substantive" rule. As the courts have held, "even unambiguously procedural

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[4] See also 49 C.F.R. § 1110.3(a) ("rules relating to organization, procedure, or practice may be issued as final without notice or other public rulemaking proceedings"). As parties to the Ex Parte No. 582 proceeding, BNSF and CN had actual and timely notice of the Board's Suspension Order. Indeed, they actively opposed its entry. See page 10, below.

measures affect parties to some degree." American Hosp. Ass'n, 834 F.2d at 1047. "The mere fact that a rule may have a substantial impact does not transform it into a legislative [i.e., substantive] rule." Id. at 1046 (quotation marks and citation omitted); Kessler, 326 F.2d at 682.

Addressing virtually indistinguishable circumstances, Kessler makes clear that the Board was not required to employ notice and comment procedures. In Kessler, the FCC issued, without notice and comment, an order "freezing" acceptance of applications for certain new radio broadcast licenses during a rulemaking to re-examine the rules governing such licenses. The court held that the "freeze" had not violated the APA because it was not a substantive rule requiring notice and comment. 326 F.2d at 682. The court explained that the purpose and effect of the FCC's order "was to impose a temporary halt on the filing of new applications pending the consideration, and possible promulgation, of new rules following notice and a public hearing," and that such a temporary suspension was "a reasonable means of assuring that the objectives of the contemplated rule making proceeding would not be frustrated." Id. at 681, 685. Although the court recognized that "all procedural requirements may and do occasionally affect substantive rights," it emphasized that "this possibility does not make a procedural regulation a substantive one." Id. at 682 (quotation marks and citation omitted).

2. 49 U.S.C. § 721(b)(4) Authorized the Board to Suspend Merger Activity Without Complying With APA

The Board also had explicit statutory authority to issue the Order without complying with APA notice and comment procedures. Under 49 U.S.C. § 721(b)(4), Congress gave the Board the power to issue "an appropriate order without regard to [the APA]" when such an order is "necessary to prevent irreparable harm." Here the Board concluded that the Suspension Order was needed to "prevent irreparable harm." See Order at 11.

The record in this proceeding contains ample support for the Board's determination that ongoing Class I merger activity would cause irreparable harm. "Irreparable harm" is "potential harm which cannot [subsequently] be redressed by a legal or an equitable remedy." Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992); see also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The record is filled with support for the Board's conclusion that allowing merger

activity to proceed while the Board conducts its rulemaking would cause serious harm to the public interest. Such harms include diversion of management attention to mergers while rail service is well below acceptable levels, especially in the East, see Order at 2-3; destruction of investment incentives due to processing merger applications under rules that investors know will change, id. at 9; and duplication of agency effort while its limited staff tackles a major rulemaking, id. at 8. If the Board had not entered its Suspension Order and these harms had been allowed to occur, no subsequent remedy would provide redress.

The Board did not transform Section 721(b)(4) into a "freestanding authority to prevent whatever the Board may deem to be irreparable injury," as CN complains. CN Pet. at 3. As discussed above, the Suspension Order was firmly grounded in the Board's responsibilities with respect to authorization of rail mergers. The irreparable harm the Board found, based on one of the most extensive hearings in recent history, is inextricably linked to the "public interest" the Board is charged with safe-guarding in connection with railroad mergers.

BNSF mistakenly contends that Congress intended Section 721(b)(4) to have a "narrow scope" limited to rate suspensions, replacing the ICC's power in former Section 10707. BNSF Pet. at 4. The plain words of the statute, however, do not limit the statute to rate cases. The statute states simply that the Board may, "when necessary to prevent irreparable harm, issue an appropriate order." 49 U.S.C. § 721(b)(4). As the Supreme Court has held, "when a court is reviewing an agency decision based on a statutory interpretation, 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)). So long as "the agency interpretation is not in conflict with the plain language of the statute, deference is due." National R.R., 503 U.S. at 417 (emphasis added). There is no conflict here.

The legislative history cited by BNSF confirms that under Section 721(b)(4), the Board may exercise the ICC's former rate suspension power but it does not suggest that the new authority is

limited to that power. Had Congress intended to allow the Board to do no more than suspend rates, it surely would have used limiting language.

The precedent on which BNSF relies confirms that the Board's powers under Section 721(b)(4) are not limited to rate suspensions. In DeBruce Grain, the Board declined to issue such an order under Section 721(b)(4) not because the statute was inapplicable to allocation of grain cars, but because the petitioner failed to establish irreparable harm. Docket No. 42023, DeBruce Grain, Inc. v. Union Pacific R.R., Decisions served Apr. 27, 1998, pp. 3-4; Dec. 22, 1997, p. 3. In a related case, a court of appeals confirmed that Section 721(b)(4) authorizes "emergency orders similar to injunctions" to provide relief from grain car shortages. DeBruce Grain, Inc. v. Union Pacific R.R., 149 F.3d 787, 788 (8th Cir. 1998). It is not limited to rate suspensions.

C. The Suspension Order Does Not Deprive BNSF and CN of Any Legal Right

In several ways, BNSF and CN argue that they are legally entitled to file a merger application whenever they choose, that the Board is obligated to process it under a rigid schedule, and that any Board action interfering with this asserted entitlement is unlawful. E.g., BNSF Pet. at 5, 8; CN Pet. at 2-3. These arguments are incorrect. Neither Title 49 nor Board regulations create a right that supercedes the Board's power to adopt the Suspension Order.

1. The Statutory Deadlines

BNSF and CN contend that the Suspension Order violates the "approach to control transactions" prescribed by Congress. They claim that the Board must, under 49 U.S.C. § 11325(a), accept a complete merger application within 30 days after it is filed, and that the Board then must process that application within the time periods set forth in 49 U.S.C. § 11325(b). BNSF Pet. at 5-6; CN Pet. at 1, 2-3.

The short response is that the statutory and regulatory processing deadlines for merger applications have not been triggered. BNSF and CN had not filed an application when the Board issued its Suspension Order. The Board has no statutory duty to accept or process an application that was not

filed. In its Post-Hearing Comments, CN recognized that the statutory deadlines come into play only after an application is filed and the Board accepts it as complete. See pp. 26 & n.15, 27.

No provision of the ICC Termination Act gives BNSF and CN a statutory right to file an application whenever they choose.[5] Rather, the statute expressly delegates to the Board the decision to begin a merger proceeding. 49 U.S.C. § 11324(a) ("Board may begin a proceeding to approve and authorize" a proposed railroad merger). The numerous cases cited above, page 4 confirm that agencies may suspend the filing of applications they are otherwise required to process, just as the Board did here. The Suspension Order is no more a violation of an alleged right to file an application than the Board's prefiling notice rule, which is the equivalent of a "suspension" of merger applications with which BNSF and CN complied without objection.[6]

Furthermore, even if the Board had already accepted a CN/BNSF application, the Board could extend the deadlines governing the processing of the application in order to revise its rules. When a statute does not provide penalties for failure to abide by deadlines, the deadlines are regarded as merely "aspirational." See, e.g., Action on Smoking & Health v. Department of Labor, 100 F.3d 991, 993 (D.C. Cir. 1996) (statute and regulation providing agency "shall" issue a rule within designated time is "aspirational only"); see also BRC v. Pena, 64 F.3d 702, 704 (D.C. Cir. 1995) (absent specification of consequences if not met, statutory period within which "petition shall be decided" is "directory rather than mandatory"). Thus, the Board would have been free, even after accepting a CN/BNSF application, to suspend the procedural schedule for a reasonable time until after it adopted new merger rules.

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[5] Nor is there any entitlement to have an application accepted. Under Section 11325(a), the Board is free to reject any application that it determines to be incomplete, including an application that it finds does not present a *prima facie* case. See 49 C.F.R. § 1180.4(c)(8).

[6] Under 49 C.F.R. § 1180.4(b), the Board requires the submission of a prefiling notice at least three months in advance. This longstanding rule prevents the filing of an application whenever a railroad might choose, allowing all interested parties "to define their positions and develop their evidence before the filing." Railroad Consolidation Procedures, 366 I.C.C. 75, 81 (1982).

2. The Board's Rules

BNSF insists that the Suspension Order is unlawful because it "constitutes an unanticipated change" in agency rules regarding acceptance of merger applications. BNSF Pet. at 7. This argument is factually and legally wrong. BNSF and CN fully anticipated the Suspension Order. On the opening day of the hearings, both of their CEOs directed their testimony primarily against a merger "moratorium," and their investment bankers and paid consultants all testified against a moratorium. In their extensive Post-Hearing Comments, CN and BNSF again argued strenuously against any suspension of merger applications.[7]

BNSF claims that McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993), bars the Board from suspending merger applications that its rules authorize. McElroy has no bearing here. In McElroy the FCC violated its own rules without first announcing a change in its rules. The agency had previously stated that new applications would be accepted on a "date certain" after a five-year delay.[8] When that date arrived, the applicants filed their applications, but the FCC summarily dismissed them. Id. at 1353.

Unlike the FCC in McElroy, the Board did not violate its rules. It issued a new rule applicable to all Class I railroads providing that the Board will not accept their merger applications for a limited period. It did so before any party filed an application. Where, as here, potential applicants have "adequate notice of the Commission's intention" prior to filing an application, they have no basis for claiming prejudice or surprise. Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1317 (D.C.

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[7] Post-Hearing Comments of CN, Mar. 14, 2000; Reply of BNSF to Petition of Edison Mission Energy Company and Midwest Generation, LLC, Mar. 14, 2000.

[8] The applications at issue in McElroy were filed following the expiration of a five-year FCC ban on new cellular license applications. 990 F.2d at 1353. The validity of that moratorium was not at issue and, so far as UP is aware, was never challenged.

Cir. 1995). On the contrary, under these circumstances, "postponement of the acceptance of applications was . . . both reasonable and generally beneficial to potential applicants." Id. at 1318.

3. BNSF's Claim of Retroactive Rulemaking

BNSF's claim that the Board's Suspension Order applies "retroactively" is contrary to established law. BNSF Pet. at 2 n.2. However, the Suspension Order applies only to future applications and thus applies prospectively. As the Supreme Court has held, a decision does not operate retroactively merely because it "upsets expectations based in prior law." Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994).

The Board is free to change its rules until it acts on an application, even in a way that effectively denies the application.[9] As the courts have held, a party does not, "by virtue of filing its application, obtain the right to have it considered under the rules then applicable." PLMRS Narrowban Corp. v. FCC, 182 F.3d 995, 1000 (D.C. Cir. 1999). A "subsequent change in the regulations [is] not retroactive, let alone impermissibly retroactive." Id. at 1001. The D.C. Circuit has held in numerous cases that rule changes after an application is filed can "render[ ] valueless an application filed in reliance on a prior rule." Bergerco Canada v. U.S. Treasury Dept., 129 F.3d 189 (D.C. Cir. 1997); see also, e.g., DIRECTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997); Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 241 (D.C. Cir. 1997). As the court explained in Hispanic Info & Telcomms. Network v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989), '[t]he filing of an application creates no vested right to a

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[9] CN and BNSF both acknowledge this principle. They accept that the Board may change the standards governing the Board's decision on their application. CN Pet. at 6 (acknowledging that any merger applicant takes "regulatory risk" that a "rulemaking might reveal an additional element of the public interest"); BNSF Pet. at 8 ("every common control proceeding" involves risk that Board will change its standards).

hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed."[10]

II. The Balance of Public and Private Interests Strongly Favors the Board's Suspension Order

As the Board has held, unless the public interest "strongly" favors a stay and the party seeking a stay will suffer greater irreparable harm than other parties and the public interest, the stay should be denied. BNSF Pet. at 2. The extensive record in this proceeding shows overwhelmingly that the public interest does not favor a stay, and the BNSF and CN claims of irreparable harm are speculative.

CN attempts to minimize the Board's findings that the public interest justifies the Suspension Order by arguing that harm can be avoided by accepting its application and rejecting later mergers. CN Pet. at 4-6. As the Board held, however, and as its record overwhelmingly confirms, the Suspension Order is justified by the near-term consequences of considering any Class I merger proposals. Some of those harms are already occurring due to the CN/BNSF proposal, including financial sector instability and diversion of management attention from improving rail service to mergers. Order at 5-7. In light of these findings, BNSF and CN cannot establish that a stay is in the public interest.

BNSF and CN claim irreparable harm if a stay is not granted and their application is delayed. But as the D.C. Circuit has held, regulatory delay almost never creates irreparable harm. "Only under extraordinary circumstances will administrative delay lead to a clear showing of irreparable injury." See Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 108 (1986). This is especially true here, where the ability of CN and BNSF to consummate their proposed combination is inherently speculative. Whether CN and BNSF shareholders will vote in favor of the proposed combination is unknown. Whether a CN/BNSF merger would be approved by the Board is unknown. Whether BNSF

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[10] Neither BNSF nor CN explains why its notice of intent to file an application would defeat the Board's power to suspend acceptance of merger applications for a limited period of time. If BNSF is

(continued . . .)

and CN would consummate the transaction if it is made subject to significant conditions that the Board will develop in its rulemaking is unknown.[11]

Moreover, BNSF's and CN's allegations of irreparable harm are based solely on their claims about the purported benefits of their proposed merger, such as their assertion that it will generate $500-$600 million in private and public benefits. BNSF Pet. at 7. Those benefit claims consist only of the bare assertions of advocates. Like the CN/IC claims of $165 million in traffic diversions from UP that did not occur,[12] the alleged benefits may prove apocryphal. Many of them, such as joint purchasing savings, appear to be achievable without consolidation and therefore are not irreparably lost at all. There is no reason for the Board to treat any alleged benefits of a future CN/BNSF combination merger as fact. BNSF and CN cannot satisfy their burden of showing irreparable harm based on speculative and hypothetical benefits.

If the Board were to recognize BNSF's and CN's speculative benefits claims, it would also need to consider the potential harms of a CN/BNSF merger to the public interest and other parties. Many participants warned of such harms. Concerned about another round of service failures, two of BNSF's and CN's largest shippers -- UPS and General Motors -- testified that the BNSF merger caused service problems that lasted for years.[13] Another large shipper, Pacer International, contended that, unless

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(. . . continued)

arguing that its "prefiling notification" under 49 C.F.R. § 1180.4(b) obligates the Board to accept its application, it cites no authority for that claim. BNSF Pet. at 6.

[11] The cases cited by CN (CN Pet. at 8 n.12) for the proposition that denying an opportunity to merge establishes irreparable harm are inapposite. None involved mergers that were subject to agency approval on a public interest standard. All involved attempted hostile takeovers where any regulatory delay would give the target an opportunity to implement defensive measures to prevent the takeover. Here, both BNSF and CN have agreed to combine and are, as their coordinated stay petitions illustrate, continuing to pursue their proposed transaction notwithstanding the Suspension Order.

[12] UP Comments, Feb. 29, 2000, pp. 13-15; Statement of Richard K. Davidson, p. 5.

[13] Statement on behalf of United Parcel Service, Inc., p. 2 ("rail service is seriously problematic for an extended two to three year post-merger period"; UPS' live testimony confirmed that the BNSF merger

(continued . . .)

other railroads respond with mergers of their own, CN/BNSF would become a "dominant system."[14] Similarly, the President and Chief Executive Officer of Kansas City Southern Railway testified that a CN/BNSF combination would destroy a beneficial alliance among CN, IC and KCS and force KCS to give up its independent existence.[15] In sum, BNSF and CN have failed to make any credible showing of concrete irreparable harm, much less harm that outweighs the Board's well-supported finding of harms to the public interest.

(. . . continued)

had this effect); Statement of Nicholas P. Matick, Executive-in-Charge, General Motors North American Operations, Production Control Logistics, Mar. 9, 2000, p. 3 ("GM has experienced significant disruptions and overall service deterioration from the 1995 Burlington Northern/Santa Fe consolidation" during the first three years after the consolidation).

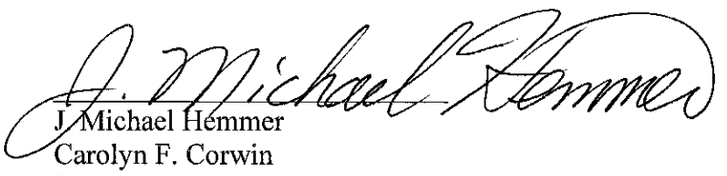
[14] Pacer Int'l., Inc. letter, Feb. 24, 2000, p. 1.

[15] Written Statement of Michael R. Haverty, Feb. 29, 2000, p. 9.

CONCLUSION

The Board should reject the stays BNSF and CN seek. The Board had ample power to suspend receipt and processing of Class I merger applications while it revises outdated rules, just as other agencies have halted applications when it is in the public interest to do so. In taking this step, the Board violated no provision of law or procedural requirement. Its finding that the public interest requires such a pause was overwhelmingly correct.

Respectfully submitted,



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March 27, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2000, a copy of the foregoing "Reply of Union Pacific to Petitions for Stay" and a copy of "Union Pacific's Petition to File Consolidated Response to Stay Petitions of BNSF and CN" was served by regular mail, postage pre-paid, or a more expeditious manner of delivery on the following individuals:

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